LEE ENG EOW

v.

MARY LEE & ANOR

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: P-02-264 OF 1998]
16 JUNE 1999

CIVIL PROCEDURE: *Parties - Proper parties to be sued - Suit against executor for breach of trust and fiduciary duty - Whether wrong to sue executor as director of a limited company - Whether executor should have been sued in his personal capacity or as executor of testator's estate - Whether cause of action disclosed - Rules of the High Court 1980, O. 6 r. 3(1)*

CIVIL PROCEDURE: *Originating summons - Suit against company - Whether company properly sued - Whether wrong to sue director of company - Whether cause of action disclosed - Rules of the High Court 1980, O. 7 r. 3(1) - Companies Act 1965, s. 16(5)*

The testator made a will leaving his residuary estate to his wife ('W') and two sons ('E' and 'H'). Upon his death, the testator's estate devolved on W, E (who was the instant appellant), and the surviving issue of H (H having predeceased the testator). The executors of the will were W and E until W's demise.

Subsequently, the executrix of W's estate and the administratrixes of H's estate ('the respondents') issued an originating summons ('the OS') against E in his capacity **as a director** of a limited company ('Lee&Co'), praying for, *inter alia*: (i) a declaration that the testator's estate be divided equally between the 1st respondent, the 2nd respondent, and E; and (ii) orders for transfer of shares and rectification of register in respect of Lee&Co.

Held:
Per NH Chan JCA

[1] The OS was shoddily drafted. If the respondents had intended to sue E for breach of trust or fiduciary duty, then they should have sued E either in his personal capacity or as the executor of the testator's estate, not as a director of Lee&Co. The respondents did not even identify their cause of action against E.

[2] The orders sought by the respondents were also not founded on any cause of action against Lee&Co. The OS itself did not disclose any reasonable cause of action against Lee&Co. And even if the respondents had a cause of action (and assuming they intended to sue Lee&Co), they had not sued Lee&Co but had sued the wrong party by suing E as a director of Lee&Co. The learned judge should have dismissed the OS.

[Appeal allowed.]

Case(s) referred to:
Lee v. Lee's Air Farming Ltd [1961] AC 12 ***(refd)***
Letang v. Cooper [1965] 1 QB 232 ***(refd)***
Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd [1997] 1 MLJ 409 ***(refd)***
Salomon v. Salomon & Co Ltd [1897] AC 22 ***(refd)***
Saraswathy Devi v. Vijayalakshmi Devi [1998] 1 CLJ 1035 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 16(5)
Rules of the High Court 1980, O. 5 r. 1, O. 6 rr. 2(1)(a), 3(1), O. 7 r. 3(1)
Wills Act 1959, s. 25

Other source(s) referred to:
Company Law, Walter Woon, 1988, pp 25, 225
Fowler's Modern English Usage, Sir Ernest Gowers, 2nd edn, pp 649, 650

For the appellant - V Sivagurupatham; M/s Sivaguru & Co
For the respondents - Gerard Chan Weng Yew; M/s Lim Kean Siew & Co

[Appeal from High Court, Penang; Originating Summons No: 24-985-97]

Reported by Alex KC Lee

JUDGMENT

NH Chan JCA:

We heard this appeal on 25 January 1999 and gave our decision the same day. We allowed the appeal. We give our reasons below.

On 18 April 1972, Lee Guat Cheow (since deceased) made a will in which he left his residuary estate to his wife and to his two sons. Clause 6 of the will states:

> I hereby devise and bequeath all my remaining estate both real and personal whatsoever and wheresoever absolutely to my said wife Low Ai Lean and my sons Lee Eng Eow and Lee Eng Hai in equal shares.

One of the sons Lee Eng Hai predeceased his father. He died on 6 July 1977. It appears that at the time of his death he left issue. The testator Lee Guat Cheow died on 5 September 1980. The effect, it seems, is that at the time of the testator's death his residuary estate devolved on his wife, his son Lee Eng Eow and the issue of the late Lee Eng Hai who have survived the testator (s. 25, Wills Act 1959).

The executors of the will of the late Lee Guat Cheow (when the will was probated) were the wife of the testator Mrs Lee Ai Lian, nee Low and his son Lee Eng Eow. Subsequently, on 29 December 1996 Low Ai Lian died and that left Lee Eng Eow as the remaining executor.

In late 1997, the executrix of the estate of Low Ai Lian, deceased and the administratrixes of the estate of Lee Eng Hai, deceased brought the present action by originating summons against Lee Eng Eow in his capacity as a director of a limited company known as Lee Guat Cheow & Co. Sdn Bhd. *[Any Latin agent-noun ending in -tor could form a feminine in -trix and the Latin plural for that is -ices. So that, the plural for administratrix is administratrices. But, when it comes to usage lawyers have used their own spelling. In a letter to The Times, the Senior Registrar of Probate wrote, 'It has long been the practice' he said 'of the devotees of the somewhat esoteric cult of probate freely to employ the word executrixes ...': see Fowler's Modern English Usage (2nd edn revised by Sir Ernest Gowers), pp. 649, 650. In the same vein judges have always spelt the word judgement as judgment in their written decisions].* We are appalled at the laxity of the person responsible for the shoddy drafting of the originating summons. We reproduce it below so that when we comment on it in our judgment the defects can be seen at once.

IN THE HIGH COURT OF MALAYA AT PENANG
ORIGINATING SUMMONS NO. 24-985-97

BETWEEN

1. Mary Lee as Executrix of the Estate of Low Ai Lian, deceased

2. Teh Lay Nah and Lee Soo Ming as administratrices of the Estate of Lee Eng Hai, deceased ... Plaintiffs

AND

Lee Eng Eow as Director of Lee Guat Cheow & Co Sdn Bhd (Under Receivership) ... Defendant

ORIGINATING SUMMONS

LET ALL PARTIES CONCERNED attend before the Judge on the 26th day of February 1998 at 9.00 am to hear an application of the plaintiffs for a declaration and the following orders:

1. A declaration that that according to the construction and interpretation of Clause 6 of the Will of Lee Guat Cheow dated 18th April 1972, that all the remaining estate both real and personal whatsoever and wheresoever of the Estate of Lee Guat Cheow, deceased be divided in the follwing manner:

   a) 1/3 to the 1st plaintiff as executor of the Estate of Low Ai Lian, deceased.

   b) 1/3 to the 2nd plaintiffs as administratrices of the Estate of Lee Eng Hai, deceased.

   c) 1/3 to Lee Eng Eow.

2. An order that the defendant do instruct the directors and/or secretaries, of Lee Guat Cheow & Co Sdn Bhd to transfer the shares and rectify the register of the said company's shareholders in the following manner:-

   i) 780 shares in the said company held by Low Ai Lian, deceased in her personal capacity to be transmitted to Mary Lee.

   ii) 1/3 of 1,300 shares to be transmitted from the Estate of Lee Guat Cheow, deceased to the Estate of Low Ai Lian, deceased and subsequently from the Estate of Low Ai Lian, deceased to the 1st plaintiff.

   iii) 1/3 of 1.300 shares to be transmitted from the Estate of Lee Guat Cheow, deceased to the Estate of Lee Eng Hai, deceased and subsequently from the Estate of Lee Eng Hai, deceased to the 2nd plaintiffs.

3. That pending the above rectification of register, Lee Eng Eow is restrained from voting on the 1,300 shares of Lee Guat Cheow & Co Sdn Bhd as sole surviving executor.

4. That the 1st plaintiff be eligible to be elected as a director and that she has voting rights in pursuant to the 780 and 1/3 of 1,300 shares in the *(sic)* Lee Guat Cheow & Co Sdn Bhd.

5. Costs of this application to the plaintiffs.

This is a most strange document. The plaintiffs never bothered to identify their cause or causes of action against the defendant. If the plaintiffs had intended to sue the company Lee Guat Cheow & Co. Sdn Bhd, then they have sued the wrong party. And yet, here we have an action brought against an individual director of a company and not the company. And, if they had intended to sue Lee Eng Eow for breach of fiduciary duty or for breach of trust or even as executor in a construction summons for an interpretation of the will, then these plaintiffs should have sued Lee Eng Eow either in his personal capacity or as executor of the estate of Lee Guat Cheow, deceased. But, here, we have an action brought against a director of a limited company. We are unable to apprehend from this originating summons what cause of action these plaintiffs could possibly have against this limited company or any of its directors.

Order 6 r. 3(1) of the Rules of the High Court (RHC) reads:

> 3(1) Before a writ is issued it must be endorsed –
>
> (a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues;
>
> (b) **where a defendant is sued in a representative capacity, with a statement of the capacity in which he is sued.** (We have supplied the emphasis)

Here, in the present case, the defendant Lee Eng Eow was not sued in his capacity as an executor of the estate of Lee Guat Cheow, deceased nor was he sued in his personal capacity. If he was sued for breach of fiduciary duty or for breach of trust, then he should have been cited as defendant either in his own name or in his representative capacity as an executor of the estate of the deceased. But, here, the defendant was sued as a director of Lee Guat Cheow & Co. Sdn Bhd.

One of the first things a law student learns is that a limited company has a separate legal personality of its own. It can only sue or be sued in its own name. And here we have a case of a company being sued, not in the name of the company, but in the name of one of its directors by people who are not even members of the company. If the plaintiffs were members of the company (but they were not in the instant case) and they felt that a wrong had been done to the company, then, perhaps (in such a situation) they might be able to bring a derivative action against the directors of the company and also to add the company as a nominal defendant so that it might be bound by the result. We frown upon the conduct of the counsel who had appeared for the respondents (plaintiffs) in the court below for insisting on pursuing with his clients' action (which was misconceived *ab initio*) and for still supporting it even when it was before us in the Court of Appeal as if the law does not matter.

Section 16(5) of the Companies Act 1965 provides as follows:

> 16(5) On and from the date of incorporation specified in the certificate of incorporation but subject to this Act the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.

What that passage means is this, and we quote from Walter Woon, *Company Law* (1988), at p. 25:

> (a) the company is a body corporate with the powers of an incorporated company;
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> **(b) it may sue and be sued in its own name;**
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> (c) it has perpetual succession;
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> (d) it may own land; and
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> (e) the liability of the members may be limited. (we have supplied the emphasis)

In addition to the statutory effects of incorporation, there is also a fundamental difference between an incorporated and an unincorporated association, in that an incorporated association has a legal personality of its own apart from the persons who comprise it. The separate legal personality of a company is not specifically provided for in the Companies Act. Nevertheless, the whole scheme of the Act is predicated upon the company's separate existence: see Walter Woon, *supra*, at p. 25; and the well-known cases of *Salomon v. Salomon & Co. Ltd* [1897] AC 22, HL and *Lee v. Lee's Air Farming Ltd* [1961] AC 12, PC. This is elementary law. Yet, we have here a practising lawyer who is unaware of what is trite who has the audacity to appear before us in the Court of Appeal. Now, we can appreciate why there is a move to restrict lawyers with inadequate knowledge of the law and insufficient experience from appearing in the superior courts.

If a director breaches his duty to the company, it is the company who has the right to sue him. A member cannot sue the director on the company's behalf. If a contracting party breaches his contract with the company, it is the company who has the right to sue the contractor. A member of the company cannot sue on the company's behalf to enforce a company's rights. This rule is known as the "proper plaintiff rule" or the "rule in *Foss v.*

Harbottle": see Walter Woon, *supra,* at p. 225. Again, this is elementary law. But we have here, in the present case, these plaintiffs (who are not members of the company) who are legally represented suing a director of a company when even a member cannot sue him on the company's behalf.

Do the pleadings in the present case disclose any reasonable cause of action against the appellant (defendant) as a director of Lee Guat Cheow & Co. Sdn Bhd? Order 5 r. 1 of the RHC states that "civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition".

Order 6 r. 2(1)(a) states:

> 2(1) Before a writ is issued it must be endorsed –
>
> (a) with a statement of claim or, if the statement is not endorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby;

And Order 7 r. 3(1) states:

> 3(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

"So that an originating summons is just like a pleading in a statement of claim, it must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. In other words, an originating summons, like a statement of claim, must disclose a cause of action (*Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409). Therefore, if the summons itself, as in the instant case, does not disclose any cause of action, it can be dismissed.": see *Saraswathy Devi v. Vijayalakshmi Devi* [1998] 1 MLJ 89, at 96 which is a decision of this court. The words "cause of action" have been defined by Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232, at 242 as meaning "simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person".

Since the orders sought by the plaintiffs in the instant originating summons are not founded on any cause of action against the company, the originating summons should have been dismissed. The originating summons itself does not disclose any reasonable cause of action against the company. In any case, even if they have a cause of action against the company (which they have

not), the respondents have not sued the company. They have sued a director of the company who is the wrong party to be sued. The judge below was wrong to have granted the orders sought by the respondents (plaintiffs). We have allowed the appeal with costs here and in the court below with the result that the originating summons is dismissed.